UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

SEVEN-UP/RC BOTTLING,

Employer

and Case 21-RC-20881

TEAMSTERS LOCALS 495, 848, 896 and 952

Petitioner

SEVEN-UP/RC BOTTLING,

Employer

and

RUBEN BARAJAS, An Individual, Case 21-RD-2816

Petitioner

and

AMALGAMATED INDUSTRIAL WORKERS UNION, LOCAL 2061,

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was conducted

before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner in Case 21-RC-20881, the Union in Case 21-RD-2816, and United Industrial, Service, Transportation, Professional and Government Workers of America of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District/NMU, AFL-CIO (hereinafter called the Intervenor[1]), are and each of them is, a labor organization within the meaning of Section 2(5) of the Act, and each seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within

[1]On June 1, 2006, a formal request from the Intervenor to intervene was received by Region 21, accompanied by a showing of interest which was administratively determined to be adequate. Pursuant to the NLRB's Casehandling Manual, Part Two, Representation Proceedings, Section 11026.2(b), said request is hereby granted. A copy of the request is attached hereto and is entered into the instant Record as Board Exhibit No. 2.

the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act[2]:

> All full time and regular part time body and fender employees, garage mechanic "A", garage mechanic "B", garage mechanic helper, production maintenance, production maintenance helper, dispenser mechanic "A", dispenser mechanic "B", dispenser mechanic "C", dispenser/vending utility, semi-driver, semi-driver (doubles), bulk pre-sales delivery (40+), pre-sales delivery, fountain/vending delivery drivers, utility driver, merchandiser, special events crew, display/stocker, facility painter, fleet painter, shipping & receiving, syrup/CIP, carpenter, janitor, machine operator, yard tractor operator, lift truck operator, warehouse crew, plant crew, stockroom/material attendant, garage utility, seasonal help-delivery drivers, seasonal other (full and part-time), employed at the Employer's facilities located in Los Angeles County; Orange County; and at the employer's Camarillo, California facility; excluding all other employees, technical employees, quality control technicians, professional employees, temporary employees, office clerical employees, sales persons, guards, and supervisors as defined in the Act.

ISSUES AND CONCLUSIONS

The only issue presented is the contention by the Employer and the Union that a contract bar exists and that as a result, the petitions should be dismissed. The Petitioner in Case 21-RC-20881 and the Petitioner in Case 21-RD-2816 both

[2] The unit description is based on all parties' agreement at the hearing. Moreover, the unit description conforms with the unit described in the contract between the Employer and the Incumbent Union, as corrected at the hearing.

contend that no contract bar exists and that there is no bar to the conduct of an election.

Based on the record in this case and the considerations noted below, it is concluded that no contract bar exists because the Union effectively notified the Employer that it wished to terminate their collective-bargaining agreement and thereafter, a new contract was not attained until after the filing dates of the two petitions herein. Accordingly, I shall direct an election as noted below.

FACTS

The relevant facts are not in dispute. The Employer and the Union were parties to a collective-bargaining agreement (herein called the contract), covering the unit employees. The contract, at Section 21.00, specified that the term of the agreement was from October 1, 2000 through September 30, 2005. Specifically, Section 21.00 of the Contract states:

> The term of the new agreement shall be in effect through September 30, 2005, except in 2003, only Section 4.00 and Section 16.00 shall be reopened for the purpose of negotiating wages, base rates and commissions as applicable, as well as negotiating health and welfare contrictutions, coverages and administration. Accordingly, the parties agree to meet July of 2003 to consider wage rates, health and welfare contributions, coverages and administration. No other Sections shall be reopened at this time.
>
> Otherwise this Agreement shall continue in Force from October 1, 2000 and until September 30, 2005, and shall automatically renew itself from year to year thereafter unless either party notifies the other in writing, at least ninety (90) days prior to September 30, 2005, of a desire to modify or terminate this Agreement. Such notice shall call for conference and shall be accompanied by a copy of any modification

proposed. Upon the giving of such notice, joint conference shall be arranged promptly at the convenience of the parties for negotiations. Pending negotiations of any new or modified contract, the terms hereof shall remain in full force and effect. If for any reason, the parties cannot agree upon such changes, then and in that event, such controversies shall be submitted to arbitration according to the provisions of Section 200.00 hereof.

On about June 14, 2005, the Union, by its President John Romero, sent a certified letter to the Employer which states:

In accordance with Section 21.00-Terms of Agreement, I hereby give notice that the Union is wishing to terminate our current Labor Agreement, which terminates September 30, 2005. We are requesting a conference and giving you notice that the parties may attempt to negotiate a new Labor Agreement.

On about July 18, 2005, the Employer sent to the Union, a letter which states:

The Company is in receipt of your correspondence Dated June 14, 2005 received regarding the Labor Agreement. Your letter indicated that you "hereby give notice that the Union is wishing to terminate our current Labor Agreement, which terminates September 30, 2005. We are requesting a conference and giving you notice that the parties may attempt to negotiate a new Labor Agreement." We had also anticipated receiving, in accordance with the Agreement, a copy of any modification proposed. To date we have not received such.

Therefore, it is the Company's position that This contract has automatically renewed itself for another year as we have not received a copy of any proposed modification and it is far less than 90 days prior to September 30, 2005. Please note that Section 21.00 of the Agreement specifically notes that the Agreement "shall automatically renew itself from year to year thereafter unless either party notifies the

> other in writing, at least ninety (90) days prior to September 30, 2005, of a desire to modify or terminate this Agreement. Such notice shall call for conference and shall be accompanied by a copy of any modification proposed."

After the exchange of letters, the Employer and the Union engaged in a series of conversations concerning the Union's desire to negotiate a new agreement, and the Employer's contention that the contract had automatically renewed for a 1-year period. Then, by letter to the Union dated August 3, 2005, the Employer proposed as follows:

> As a settlement proposal and solely for the purpose of resolving this dispute, the Company offered to informally negotiate with AIWU and attempt to reach a new agreement, without waiving its position that AIWU is automatically bound to the current CBA for an additional year. Under this settlement scenario, if the parties are successful in negotiating a mutually acceptable agreement the instant dispute would be moot. If the parties are unable to negotiate a mutually acceptable agreement, the parties can arbitrate the instant dispute.
>
> Please advise us if the Company's settlement Proposal is acceptable. Otherwise, it is the Company's position that the current agreement automatically renewed for one year and remains in effect until September 30,2006.

The Union accepted the Employer's proposed settlement described in its August 3, 2005 letter, and they thereafter engaged in a series of negotiation sessions on days in October 2005 and January 2006[3]. As a result of these negotiations, a new

[3] At one of these sessions, the Union voiced agreement that its termination notice to the Employer had been defective and that the contract had renewed for 1 year. The same admission was thereafter repeated by Union President Romero who allegedly stated that he had "screwed up" in failing to include proposed modifications with his notice of termination. Romero did not testify at the instant hearing.

agreement was reached which was ratified by the Union's membership on April 23, 2006.

The petition in Case 21-RD-2816 was filed on February 9, 2006. The petition in Case 21-RC-20881 was filed on March 15, 2006. The two petitions were consolidated on May 25, 2006, for purposes of this proceeding, by Order of the undersigned.

BOARD STANDARDS, CONTENTIONS[4] AND ANALYSIS REGARDING CONTRACT BAR

The purpose of the Board's contract bar rules is to achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representative." Appalachian Shale Products Co., 121 NLRB 1160, 1161 (1958).

As the Board explained in Direct Press Modern Litho, Inc., 328 NLRB 860, 861 (1999):

> Thus, in general, the doctrine's dual rationale is to permit the employer, the employees' chosen collective-bargaining representative, and the employees a reasonable, uninterrupted period of collective-bargaining stability, while also permitting the employees, at reasonable times, to change their bargaining representative, if that is their desire. It is worth noting that the contract bar doctrine "is not compelled by the Act or by judicial decision thereunder. It is an administrative device early adopted by the Board in the exercise of its discretion as a means of maintaining stability of collective bargaining relationships." The Board has discretion to apply a contract bar or waive its application consistent with the facts of a given case, guided overall by our interest in stability and fairness in collective-bargaining agreements. [Citations omitted.]

[4] The Employer is the only party to file a post-hearing brief.

The Board has long held that an automatically renewed agreement bars an election pursuant to a petition filed during the renewal period. ALJUD Licensed Home Care Services, 345 NLRB No. 88 (September 30, 2005). However, absent express language to the contrary, requests to negotiate changes to the contract received by the other party prior to the automatic renewal date will ordinarily prevent its renewal for contract bar purposes. Bridgestone/Firestone, Inc., 331 NLRB 205 (2000).

The Board, in Deluxe Metal Furniture Company, 121 NLRB 995, 1002 (1958), stated:

> An automatically renewable contract between an incumbent union and an employer will not bar an election based upon a petition filed after its expiration date, but before execution of a new contract, ***if renewal has been forestalled*** and the parties have failed to execute an agreement within the 60-day insulated period. ***Any notice*** of a desire to negotiate changes in a contract received by the other party thereto immediately preceding the automatic renewal date provided for in the contract ***will prevent its renewal for contract bar purposes***, despite provision or agreement for its continuation during negotiations, and ***regardless of the form of the notice***. [emphasis added]

Moreover, at 1002, at fn. 16 of the same Decision, the Board explained:

> The old rule is still applicable that *the* ***effectiveness of timely notice to forestall*** automatic renewal ***is not changed*** by inaction of the parties thereafter, ***even though the contract required certain action within a specified period;*** rejection of the notice; or withdrawal of the notice. [emphasis added]

Based on this guidance, it is concluded that the Incumbent Union effectively forestalled the automatic renewal of the contract, for contract bar purposes, by its timely written notice to the Employer on June 14, 2005 where it clearly informed that the Union "is wishing to terminate our current Labor Agreement, which terminates September 30, 2005. We are requesting a conference and giving you notice that the parties may attempt to negotiate a new Labor Agreement."

I reach this conclusion notwithstanding the provision of the contract which required the Union to concurrently provide a "copy of any modification proposed." Because the Union's timely written notice of June 14 clearly conveys its desire to terminate the Contract and to negotiate a new contract, said notice effectively forestalls automatic renewal for contract bar purposes.

Because there was no automatic renewal of the contract for another year, and because the Employer and the Union did not reach agreement on a new contract until April 23, 2006, there is no contract bar to prevent the filing and processing of either the RD or the RC petitions. Accordingly, the Employer's and the Union's contention that a contract bar prevents the filing of said petitions, is rejected.

The Employer argues that the Union's notice to terminate the contract and negotiate a new contract was defective because it failed to adhere to all provisions specified in Section 21.00 of the contract, in that the Union failed to

accompany its June 14, 2005 notice with a "copy of any modification proposed."

The Employer does not dispute that clear notice was provided by the Union that it wished to terminate the contract and that it wished to negotiate a new contract. Thus, the Employer's entire contention is based on its position that because the notice failed to include a copy of proposed modifications, the contract automatically renewed; and that the contract therefore serves as a contract bar to the filing of the two petitions.

The Employer relies on Mason City Builders Supply Co., 193 NLRB 177, 178 (1977) for the proposition that a contract will automatically renew if the party providing the notice to terminate failed to provide contractually-required proposed modifications. Mason City Builders is distinguishable from the present case as it concerned an unfair labor practice case which did not address the issue of contract bar in a representation-case context.

The Employer also cites KCW Furniture Company, 247 NLRB 541 (1980), for the proposition that the Board will give effect "to the agreement of the parties on automatic renewal provisions, and will find automatic renewal unless the proper notice of termination or modification is given." The Employer's reliance is misplaced. KCW Furniture is also a case which considered unfair labor practices and it did not consider when a renewal clause serves to constitute a contract bar in a representation case situation.

Moreover, the contract under review in KCW Furniture, contained a renewal clause which specifically provided that "a notice of opening cannot be construed as terminating or as forestalling the automatic renewal of the agreement." Said contract also provided that in order for either party to forestall automatic renewal of the agreement, "the agreement can be terminated either by mutual written agreement or by giving a notice of termination not later than 60 days nor more than 90 days prior to the expiration date." The Board concluded that because neither party provided the required written notice of termination, the contract automatically renewed, notwithstanding that the parties proceeded to negotiate modifications to the agreement.

Finally, the Employer cites Providence Television, Inc., 194 NLRB 759 (1971), for the proposition that "an automatically renewed contract constitutes a contract-bar to a representation petition." In Providence Television, the Board reviewed a Regional Director's finding that there was no contract bar because the parties had re-opened negotiations during the term of an agreement and modified terms of said agreement. The Board overruled, concluding that the contract under consideration specified that if either party wished to terminate the agreement and negotiate a new agreement, written notice was required. Because written notice of termination was never given, the mere modification of the contract did not forestall the automatic renewal clause; and consequently, a contract bar was found.

Contrary to the Providence Television situation, the Union herein did provide timely notice to terminate the contract, and the effect of said notice, therefore, was to effectively forestall the automatic renewal clause.

The Employer ignores the guidance provided in Deluxe Metal Furniture, as quoted above, which specifically states that an automatic renewal clause will be forestalled and will not act as a contract bar, if timely notice is provided, without regard to the form of the notice, and without regard to whether other contractual provisions (such as the provision herein calling for a list of proposed modifications to be attached to the notice of termination) have been adhered to.

Thus, the Employer's contention in this regard is rejected.[5] The automatic renewal of the contract was forestalled by the Union's notice, and the contract therefore does not act as a contract bar to the present petitions. I shall, therefore, direct an election in the appropriate unit.

There are approximately 720 employees in the unit found to be appropriate.

DIRECTION OF ELECTION

[5] The Employer's contention that the Union's admission in early 2006 that the contract had automatically renewed because the Union had failed to include its proposed modifications at the time that it presented notice of termination, under New England Lead Burning Company, Inc.,133 NLRB 863 (1961), further establishes that the renewal clause did take effect and that therefore there is a contract bar, is similarly misplaced. Thus, in the New England Lead case, the union rescinded a notice of termination, thereby withdrawing the notice which otherwise would have forestalled the automatic renewal of the agreement. In contrast to that case, in the present case, the Union merely acknowledged that it had failed to include a list of proposed modifications at the time of notice of termination; the Union never rescinded its notice.

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the **Amalgamated Industrial Workers Union, Local 2061; Teamsters Locals 495, 848, 896 and 952; United Industrial, Service,**

Transportation, Professional and Government Workers of America of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District/NMU, AFL-CIO; or by **No Union**.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994).

In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017, **on or before June 14, 2006.** No extension of time to file the list shall be granted, excepted in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be

submitted by facsimile transmission to (213) 894-2778. Since the list is to be made available to all parties to the election, please furnish a total of five (5) copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. The Board in Washington must receive this request by 5 p.m., EST, on June 21, 2006. This request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence, for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: **www.nlrb.gov**

DATED at Los Angeles, California, this 7th day of June, 2006.

/s/ Victoria E. Aguayo
Victoria E. Aguayo
Regional Director, Region 21
National Labor Relations Board